GOH SIEW WAH

v.

PP

HIGH COURT MALAYA, JOHOR BAHRU
KP GENGADHARAN JC
[CRIMINAL APPEAL NO: MT(3) 41-50-2002]
15 DECEMBER 2003

CRIMINAL PROCEDURE: *Sentence - Assault - Plea of guilty - Assaulting teachers at school - Sentenced to 5 months' imprisonment - Whether excessive - Whether extenuating circumstances not considered - Penal Code s. 323*

The appellant had pleaded guilty to two charges under s. 323 Penal Code for assaulting two teachers in a staff room of a school and upon conviction was sentenced to 5 months' imprisonment on each count of the charges. In this appeal against the sentences imposed, a question arose as to whether the sentences ought to be disturbed considering that: (i) the appellant was unrepresented by counsel; (ii) one of the factors that the learned Magistrate took into consideration when imposing the jail term was the lack or absence of a proper mitigation by the appellant; (iii) the teachers were assaulted after the appellant's 11 years old son had been slapped and caned by a teacher; and (iv) the appellant had served his incarceration for 8 days before being released on bail.

Held (allowing the appeal):

[1] The sentences of 5 months' imprisonment were excessive and harsh in the circumstances and facts of this case. The accused was unrepresented and unable to make a proper plea in mitigation. Therefore, the learned magistrate, in deciding the appropriate sentence, ought to have, on his own accord, considered the extenuating mitigating facts arising from the evidence. The learned magistrate ought to have considered the fact that there were some element of provocation (*ie*, the son being caned and slapped) leading to the accused behaving the way he did, and further that, the charges, being compoundable under the Criminal Procedure Code, were not so serious as to warrant 5 months of incarceration. (pp 178 h & 180 a-b)

[2] The sentence of 5 months' imprisonment is set aside and substituted with a term of 8 days' imprisonment with effect from the date of conviction in respect of each charge, the terms to run concurrently. In addition, the court

would impose a fine of RM1,000 in default 3 months' imprisonment for the 1st charge and a fine of RM500 in default 1 month imprisonment in respect of the second charge. (p 180 e-f)

Case(s) referred to:
Liow Siow Long v. PP [1970] 1 MLJ 40 ***(refd)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Penal Code, ss. 323, 353

For the respondent - Juraidah Abbas DPP
For the appellant - Hj Nordin Hussain; M/s Tia & Nordin

Reported by WA Sharif

JUDGMENT

KP Gengadharan JC:
The accused faced two charges (consolidated cases) in the magistrate's court as follows:

1) Bahawa kamu pada 26.07.2000 jam lebih kurang 1.20 petang di bilik guru Sekolah Jenis Kebangsaan Kulai (1) Kulai, didalam daerah Johor Bahru di dalam negeri Johor telah dengan sengaja mendatangkan kecederaan ke atas seorang guru perempuan Lee Bee Hwa - K/P 671006-086122 di bahagian ppi kiri. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 323 kanun keseksaan.

2) Bahawa kamu pada 26.07.2000 jam lebih kurang 1.20 petang di bilik guru Sekolah Jenis Kebangsaan Kulai (1) Kulai, Didalam daerah Johor Bahru di dalam negeri Johor telah dengan sengaja mendatangkan kecederaan ke atas seorang guru lelaki Pang Nam Soon - K/P 5565516 di bahagian tangan kiri oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 323 kanun keseksaan.

The accused who was then unrepresented claimed trial to both charges and was found guilty of both charges after the trial. He was sentenced to five months' imprisonment w.e.f 22 August 2001 in respect of each charge, the sentences to run concurrently. He served eight days of the sentence before he was released on bail (upon applying for a stay of the sentence) pending his appeal against both the convictions and the sentences.

The brief facts of the case are as follows:

1) The accused's son, aged 11 years at the material time, attended the Sekolah Rendah Kebangsaan Kulai (1) in Kulai Johor. On 26 July 2001 the accused's son was punished with two strokes of a cane and was also slapped by the teacher named in the 1st charge above over an accident described by the teacher as follows in her evidence at the hearing in the magistrate's court:

> Saya nampak satu murid tahun 5 tendang murid tahun 1 - Goh Kai Nai dan Heng Jia Jin.
>
> Murid tahun 1 Heng Jia Jin.
>
> Selepas lihat kejadian, saya tuju ketempat Goh berdiri dan tegur dia tentang perbuatan Goh tendang budak tahun 1 itu.
>
> Kemudian, Goh meninggikan suara dengan tangan saya "Mengapa saya tidak boleh buat demikian, malahan dia kawan saya".
>
> Saya tegur lagi, perbuatan tersebut tidak betul. Itu budak kecil, lagipun dia tahun 1.
>
> Kemudian Goh - lagi kasar suaranya; jerit dengan kuat "Mengapa saya tidak boleh demikian?" Saya menggunakan rotan dan merotannya 2 kali.
>
> Selepas rotannya, dia berhadapan dengan saya. Kurang daripada 1 kaki.
>
> Dia tinggikan suaranya lebih tinggi daripada sebutannya "Mengapa rotan saya sahaja tetapi tidak rotan budak itu?"
>
> Dalam masa itu; dia juga pegang pergelangan tangan kiri saya.
>
> Saya gunakan tangan kanan saya tampar pipi kiri dia. Cos' dia cabar kewibawaan guru disiplin.

2) As a result of the beating with the cane and the slapping the accused confronted the teacher in the staff room of the school on that day before the school session ended and an argument ensued between them resulting in the accused slapping the teacher once. Following this another teacher (named in the 2nd charge above) who came to the assistance of the first teacher was hit or knocked once on the hand by the accused whilst still in the staffroom after some words were exchanged between them.

At the hearing of the appeal the learned counsel for the accused withdrew the appeal against the conviction in respect of the 1st charge and proceeded only in respect of the sentence. However, the appeal against both the conviction and sentence in respect of the 2nd charge was pursued.

At the conclusion of the submissions I dismissed the appeal against the conviction as there was no merit in it but set aside the sentence of five months' imprisonment in respect of each of the two charges and substituted same with a term of imprisonment of eight days w.e.f the date of conviction by the magistrate's court (ie, 22 August 2001) in respect of each charge, the terms to run concurrently. I further imposed a fine of RM1,000, in default three months' imprisonment, for the 1st charge and a fine of RM500, in default one month imprisonment, in respect of the 2nd charge.

The learned public prosecutor has now appealed against the decision to vary the sentences imposed by the learned magistrate.

In mitigation, during this appeal, learned counsel for the accused stated that the accused (now aged 48 years, married and with two children) was remorseful and repentant about his conduct that led to the charges against him and had suffered the torture and agony of the cases hanging over his head for three years. Learned counsel urged the court to bind over the accused under s. 294 of the Criminal Procedure Code (CPC) or impose a fine but not custodial sentences.

The learned DPP urged the court not to reduce the sentences submitting that the public interest must be considered as the two teachers were assaulted in the staff room of the school adding that the teaching institution must be respected as the teaching profession is a noble one. It was further submitted that after the conviction the accused was not remorseful at all as he did not say anything in mitigation in the magistrate's court.

In respect of the submission about the accused not pleading in mitigation I am of the humble view that not saying anything in mitigation does not necessarily mean that the accused was not remorseful as it could well have been out of sheer ignorance as to what he could, should or had to say in mitigation after having been found guilty of the charges. This failure on the part of the accused to mitigate should not to be held against him.

I was of the view, in this case, that the sentences of five months' imprisonment imposed by the magistrate's court were excessive and harsh in the circumstances and facts of this case. The accused was unrepresented in the magistrate's court and he did not make any plea in mitigation other than to say that he was not in the wrong ("tidak salah") when he was asked for his mitigation plea. Thus, it appears that he did not know what a proper mitigation plea entailed. In such circumstances when the accused did not make a proper plea in mitigation I am of the view that the trial magistrate ought to have, in deciding upon an appropriate sentence, considered the extenuating mitigating facts arising from the evidence, on his own accord, that led to the accused committing the offences.

Raja Azlan Shah J (as His Highness then was) stated in *Liow Siow Long v. PP* [1970] 1 MLJ 40 as follows:

> It is not in doubt that the right measure of punishment for an offence is a matter in which no hard and fast rules can be laid down and it is to be determined by a consideration of a variety of circumstances. In assessing sentence, the primary consideration is the character and magnitude of the offence, but the court cannot lose sight of the proportion which must be maintained between the offence and the penalty and the extenuating circumstances which might exist in the case.

In *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 270 Hashim Yeop A Sani J (as he then was) stated as follows:

> No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

The aforesaid case involved a charge of assaulting a public servant under s. 353 of the Panel Code which was punishable with imprisonment for a term which may extend to two years, or with fine, or with both. The accused in that case (who had pleaded guilty) had been sentenced to three months' imprisonment. The learned judge set aside the sentence and bound over the accused stating that:

> Considering all the facts before the court I have come to the conclusion that the public interest is in no way better served by committing the appellant to prison. The primary purpose of punishment is reformatory and it is clear in this case that the appellant has realised the fact that notwithstanding his status he is not above the law. He has also clearly stated that he has repented and would not make the same mistake again. Under the circumstances it is my opinion that the public interest is best served by setting aside the sentence of imprisonment and substituting therefore an order under section 294(i) of the Criminal Procedure Code that the appellant enter into a bond with one surety in the sum of one thousand dollars for a period of two years and in the meantime to keep the peace and be of good behaviour.

In the present case the learned magistrate has merely stated as follows in his grounds of judgment in respect of the sentences he imposed:

> OKS tiada membuat sebarang rayuan terhadap hukuman yang bakal dikenakan terhadapnya. Pun begitu, mahkamah tidak perlu terburu-buru menjatuhkan hukuman tanpa menimbangkan kes-kes "public interest", dengan kesalahan yang telah dilakukan oleh OKS.

I am of the view that the learned magistrate ought to have considered the fact that there was some element of provocation (ie, accused's son aged 11 years being caned and slapped) leading to the accused behaving the way he did. The conduct of the accused that led to the charges arose directly from that. The accused did not plan to go to the school to assault the teachers. Prior to that incident he had no history of criminal behaviour. Further, the learned magistrate should have taken into account the fact that the charges were not so serious as to warrant five months of incarceration as the charges were also compoundable under the CPC. I was not of the view that public interest would require the accused to spend five months in prison as punishment and to be rehabilitated. Had a proper mitigation plea been made by the accused in the case before the magistrate he may not have been sentenced as he was. In such cases where the accused is unrepresented and is unable to or does not say anything in mitigation justice requires, I think, that the court take some pains to explain to the accused what is expected or required in a mitigation plea. To draw out any mitigating factors questions could be posed to the accused by the presiding magistrate and thereby prompt the accused to state anything relevant for consideration. Further, when there is no proper mitigation plea the court ought to consider the facts of the case itself to determine whether there are any mitigating factors revealed therein.

In all the circumstances of the present case I imposed a term of eight days' imprisonment as that was the number of days the accused had already served in prison before being let out on bail. In addition I imposed the fines to make the accused realize that he should keep his temper and his conduct in check in future. In the case of the 2nd charge I imposed a lesser fine as unlike slapping a teacher (as in the 1st charge), in the 2nd charge the accused merely hit and/or pushed the hand of a teacher away thereby coming into contact with him. In my view the short term of imprisonment plus the fines together with the fact that the accused will hereafter have a criminal record is sufficient punishment for someone who is a first offender and should satisfy the public interest. I did not want to bind over the accused under s. 294 of the CPC as prayed for on his behalf as a binding over will not be sufficient to send out a strong enough message, in the interest of the public, that the assaulting of teachers will not be treated lightly by the courts.